GOVERNMENT OF MALAYSIA

v.

SIM SOE HOE

HIGH COURT BORNEO, SIBU
CHONG SIEW FAI J
[CIVIL SUIT NO. 2 OF 1987]
26 AUGUST 1989

CIVIL PROCEDURE: *Entered by Government of Malaysia for assessment of taxes - Application to set aside the judgment - Regular judgment - Whether normal rule of showing a defence on merits applicable - Sections 103, 106 of the Income Tax Act 1967 - Assessed and increased taxes recoverable as debt due - Section 106 - No entertainment for plea that tax is excessive or incorrectly assessed.*

The defendant was served with notices of assessment or additional assessment relating to income taxes. The defendant failed to pay and a writ was taken out culminating with the entry of default judgment against the defendant. The defendant applied to set aside the judgment. The question arose whether in light of ss. 103(4) and (5A) and 106 of Income Tax Act 1967, which makes the assessed and increased taxes recoverable as a debt due to the Government, the normal rule of showing a defence on the merits apply in setting aside the regular judgment in default.

Held:

[1] Having regard to the nature of the claims, i.e., assessed and increased taxes payable under the Income Tax Act 1967, the relevant provisions of the Act applies.

[2] Section 103(4) & (5A) and s. 106(1) of the Act provides that tax due and payable is recoverable by the government as a debt due and thus the normal rules of showing a defence on merits does not apply in cases of such nature.

[3] As such, the defendant's plea in his affidavit that the assessment was incorrectly assessed does not suffice having regard to the relevant provisions of the Income Tax Act 1967.

[Application dismissed with costs.]

Cases referred to:

Evans v. Bartlam [1937] 2 All ER 646
Farder v. Richter [1889] 23 QBD 124
Government of Malaysia v. Abdul Rahman [1975] 1 MLJ 276
Chong Woo Yit v. Government of Malaysia [1989] 1 CLJ (Rep) 9

Legislation referred to:

Income Tax Act 1967, ss. 91(1), 99(1),(4), 103(1), 103(5A), 106(1),(3)
Real Property Gains Tax Act 1976, ss. 18(1), 21(1), (4), 23(1), (3)
Rules of the High Court 1980, O. 13 r. 8, O. 14

For the defendant - Wong Sing Nang; M/s. Wong & Co.
For the plaintiff - Vincent Josef, Assessment Officer of Inland Revenue Department

JUDGMENT

Chong Siew Fai J:

This is an application by the defendant to set aside the judgment in default of appearance obtained by the plaintiff on 17 March 1987.

The following facts are not disputed: The defendant was served with 6 notices of assessment or additional assessment relating to income or development taxes for years of assessment 1975, 1978 (additional), 1983 (2 notices), 1984 and 1985. The defendant failed to pay up, and the assessed taxes were increased by 10% and subsequently another 5% under subsections (4) and (5A) of s. 103 of the Income Tax Act 1967 respectively. As the amount was not paid, the plaintiff took out the writ herein culminating with entry of the default judgment. The defendant now seeks to set aside the default judgment.

The taxes assessed and the increased sums imposed were, if unpaid, recoverable as if they were taxes due and payable under the Act. (See s. 103(4) and (5A) of the Income Tax Act).

It is not disputed that the judgment is a regular judgment.

In his affidavit made on 25 October 1988 the defendant explained why the default judgment was suffered to be entered. Briefly, it is that after receipt of the writ of summons, he had left the matter to his "adviser and accountant" who failed to take the necessary steps to defend the action. The explanation, of course, is a factor to which the Court will have regard, if and when considering whether discretion ought to be exercised to allow the application. *Evans v. Bartlam* [1937] 2 All ER 646.

For the defendant it was contended that the defendant had a good defence on merits on the grounds that:

(1) putting concisely, some of the taxes contained in some of the notices of assessment were incorrectly assessed, in that they were not gains or profits liable to tax under the Income Tax Act 1967.

(2) the plaintiff did not refer the matters to the Special Commissioners appointed under the said Act.

In normal case, where applications are made to set aside default but regular judgments, the rule, which has sometimes been described as "an almost inflexible rule", is that there ought to be affidavits stating facts showing a defence on the merits. Or, at any rate, where the application is not thus supported, it ought not be granted except for some very sufficient reason. *Farden v. Richter* [1889] 23 QBD 124. And, to show a defence on the merits, a defendant need only disclose an arguable or triable issue.

In our instant case, the crucial question, however is: Having regard to the relevant provisions in the Income Tax Act 1967 (to which provisions I shall refer) and in view of the nature of the claims in this action, does that normal rule of showing defence on the merits apply?

Section 103(1) of the Act makes the assessed tax due and payable at the place specified in the notice of assessment whether or not the person assessed appeals against the assessment.

Under s. 103(4) and (5A) of the Act, the assessed and increased taxes shall, upon the expiry of the period therein specified, be recoverable as if they were taxes due and payable under the Act.

Section 106(1) of the Act provides that tax due and payable may be recovered by the Government by civil proceedings as a debt due to the Government, and subsection (3) of s. 106 enacts, *inter alia*, that in any proceedings under the section the Court shall not entertain any plea that the amount of tax sought to be recovered is excessive or incorrectly assessed or increased under s. 103(4) or (5A).

In *Government of Malaysia v. Abdul Rahman* [1975] 1 MLJ 276 the Court, in dismissing the appeal against the grant of leave to sign final judgment under O. 14, held that it could not entertain any plea that the tax or additional tax was incorrectly assessed. The *dictum* of the late Arulanandom J on that point was approved by the Supreme Court in the recent case of *Chong Woo Yit v. Government of Malaysia* [1989] 1 CLJ (Rep) 9 of which I am bound. I would reproduce here the relevant part of the judgment by Gunn Chit Tuan SCJ (at 13):

> We would agree and approve the following *dictum* of Arulanandom J (as he then was) in that case when he said:
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> When proceedings are commenced under O. 14 the normal rules for triable issues do not apply to cases of this nature because of the provisions of the Income Tax Act. Normally when the defence raises triable issues it is a rule of law that unconditional leave to defend should be given but under s. 106(3) of the Income Tax Act 1967 it clearly states that in any proceedings commenced by the government under s. 106(1) of the Act for the recovery of tax by civil proceedings as a debt due to the government the Court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under s. 103(4) or (5). In this case the Director-General had exercised his powers under s. 91(1) of the Act and made additional assessments and added penalties which were provided for by the Act. Since the amount was not paid within 30 days further penalties were added and since that was not paid civil proceedings were bought to recover the tax as a debt due to the government. Under s. 103(1) regarding payment of tax, the section reads:
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> 103(1) Subject to this section, tax payable under an assessment for a composite assessment shall on the service of the notice of assessment or composite assessment on the person assessed be due and payable at the place specified in that notice whether or not that person appeals against the assessment or composite assessment, as the case may be.
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> It is therefore quite clear that the Act does not contemplate any finality of assessment as it is clearly required in the Act that the moment the notice of assessment is served on the taxpayer the tax becomes payable whether the taxpayer appeals against the amount or not.
>
> We are satisfied that in this case there are no triable issues and therefore dismissed the taxpayer's appeal with costs.

Though *Chong Woo Yit's* case, *supra*, was on an O. 14 application, the principle stated above, in my opinion, equally applies to an application for setting aside default judgment under O. 13 r. 8.

The supplementary affidavit of the defendant alluded to the Real Property Gains Tax though this was not dealt with by Counsel for the defendant in his submission nor averred in the plaintiff's statement of claim. However, for the purpose of this application, I find the point raised in the supplementary affidavit immaterial and of no significance because, assuming that the Real Property Gains Tax Act 1976 applies, this Act contains similar or substantially similar provisions as those in s. 103(1) and (4) and s. 106(1) and (3) of the Income Tax Act.

(See s. 21(1) and (4) and s. 23(1) and (3) of the Real Property Gains Tax Act 1976). The result remains the same i.e., the Court will not entertain any plea that the amount of tax sought to be recovered is excessive, or incorrectly assessed or increased.

As regards the second ground of the defendant that his disputes over the assessments were not referred to the Special Commissioners, Counsel for the defendant conceded that the letters (Exhs. 'SSH2', 'SSH3' and 'SSH4' annexed to the defendant's affidavit made on 25 October 1988) were given out of time i.e., after the 30 days required under s. 99(1) of the Income Tax Act. (Section 18(1) of the Real Property Gains Tax Act 1976). There is no evidence nor has it been submitted that extension of time for giving notice of appeal had been applied for and granted. Also, the letters dealt with taxes for years of assessment 1975 and 1978 only.

For the plaintiff, it is not clear whether the complaint of the defendant is pending appeal. In any event, by virtue of s. 103(1) and (4) and s. 106(1) and (3) of the Income Tax Act, the taxes involved are due and payable and recoverable as a debt due to the Government by civil proceedings in which the plea of excessive or incorrect assessment could not be entertained. (For the equivalent of these provisions in the Real Property Gains Tax Act 1976, see above).

For the above reasons, this application is dismissed with costs to the plaintiff. In the absence of an agreement, such costs may be taxed.

Also found at [1990] 1 CLJ 279